

THE AD HOC TRIBUNALS ORAL HISTORY PROJECT

An Interview with

Patricia M. Wald

International Center for Ethics, Justice and Public Life

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Session One

Interviewee: Patricia M. Wald

Location: Washington, D.C.

Interviewers: David P. Briand (Q1) and
Susana SáCouto (Q2)

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Q1: This is an interview with Judge Patricia M. Wald for the Ad Hoc Tribunals Oral History Project at Brandeis University's International Center for Ethics, Justice and Public Life. The interview takes place at Judge Wald's home in Washington, D.C. on December 12, 2014. The interviewers are Susana SáCouto and David Briand.

Thank you so much for having us. It's a great honor to be here with you, Judge Wald. This is the third interview we've done so far in a series of interviews about the ICTY [International Criminal Tribunal for the former Yugoslavia] and the ICTR [International Criminal Tribunal for Rwanda].

Wald: Who else? Who have you done previously?

Q1: Our first was with Ben [Benjamin B.] Ferencz, the Nuremberg prosecutor.

Wald: Oh, yes. Ben is omnipresent. [Laughter]

Q1: Yesterday Leigh [Swigart] and I interviewed Alex Whiting at Harvard Law School. Thank you very much for having us. If we could begin with a little bit of background on you—could you say a little bit about where you're from and your early life?

Wald: Sure. I grew up in a small factory town in northwestern Connecticut called Torrington. My family was working class. My mother brought me up with the help of her extended family because my father disappeared; I never saw him again after I was two years old. She went back to work and I moved in with her family—my grandmother and grandfather who had emigrated from Ireland, and she had some sisters and brothers.

Nobody had gone to college before me. I went to public school, obviously. There was one public school in the city. The city had thirty thousand people and it was largely an immigrant city—we had Irish and Italian and Polish—largely Catholic. Every ethnic group had a separate Catholic church and a separate grammar school—parochial school—but nobody had a high school, so when it came time to go to high school everybody went to one high school. [Laughs] I think it was a good education.

I got a scholarship to Connecticut College for Women, where I majored in government. When I was graduating from there, there were several women teachers who very strongly urged me to go on. The choice had to be between going to graduate school—and I didn't really have any teaching vocation—or law school. I didn't really know many lawyers. My best friend in high school's father and brothers were lawyers—very conservative Republican lawyers—but I didn't really know any others.

I had worked in the factories in the summertime myself to help finance my education so I had gotten sort of a bird's eye view of what it was like to work all day on an assembly line, where I greased ball bearings. One summer I went on strike with the union and I worked for the union during the strike, so I thought I wanted to become a labor lawyer. I did get something called a Pepsi-Cola Fellowship, at that time they had this sort of essay contest—the Pepsi-Cola Company—about why you wanted to go on to graduate school or some form of graduate education. So I got one of those, which was my real break because I never could have afforded to go to law school otherwise.

I picked Yale Law School; Harvard was not accepting women at the time. I don't know if I'd have had the choice anyway, but it turned out to be very lucky for me. I had a good time at law school. It was the early days, but it was—. Yale had always taken a few women since 1915—unlike Harvard, which wasn't even accepting women until we were in the middle of law school—so we weren't like some sort of strange alien breed to them. [Laughter] We didn't have Ladies Day and we didn't have somebody telling us we were taking a spot away from a man who had to support a family. On the other hand, we were like eleven out of a class of a hundred and sixty or a hundred and seventy, so you did get called on a lot; you were much more visible. You were always the rape plaintiff in the moot courts or in the Barrister's Union trials.

On the other hand, I did have strong support from at least two of the faculty—there were no women faculty members, but I had strong support from two of the men for the Jerry

[Jerome N.] Frank clerkship on the Second Circuit. That was a real break for me. He was probably the only judge at that time—or the only one that I knew about—who was taking women clerks; he'd already taken one or two in the past. When I did go down and clerk in the Second Circuit, which would have been 1951 to 1952, I was the only woman clerk in the Second Circuit, either in the lower court or the upper court.

The clerkship was a great year, but I also got married. My husband, who'd been in my law school class, Bob Wald, and who had been called back into the Navy Reserve, was on a battle ship in the Korean War going in and out of Norfolk, so I came down to Washington because it was the nearest place that a woman could even make a real try for a job. [Laughs] Frank was a great help. He wrote me a really terrific reference to several of his old New Deal buddies. He had been a figure in the New Deal but so had people like Abe [Abraham] Fortas and Thurman [W.] Arnold and Frank [Francis M.] Shea at Shea & Gardner. There were a whole bunch of them and I did get an offer from Arnold & Porter. I worked there for a year. I was the only woman. [Laughs] It was a small firm; at that time there were only twelve people.

Q2: Total.

Wald: There were ten partners, apart from administrative or secretarial staff and two associates. [Laughs] Not an ideal ratio, but they were good to me. I worked on the Owen Lattimore case, which was a First Amendment cases that Judge [Luther W.] Youngdahl dismissed, after which the government indicted and re-indicted him—not because he was

a member of the Communist Party but merely someone whose views echoed those of the Party about China. Lattimore was a Johns Hopkins professor. He was targeted by Joe [Joseph R.] McCarthy and the government followed suit by indicting him. Youngdahl dismissed the case twice and they finally let it go.

Then I got pregnant, so I left and went down to Norfolk while Bob finished up his tour of duty, and then we came back to Washington. Then we had five children in quite rapid succession in a little over seven years, so I didn't go back to work. I didn't lose contact with the legal profession because all our friends were lawyers and I kept in touch with what was going on, so toward the end of that time—I was out for about ten years—I began doing some work at home. I worked with Fred [Frederick M.] Rowe, who was in the antitrust field, on his book on [the] Robinson-Patman [Act] [*Price Discrimination under the Robinson-Patman Act*]. Then Dan [Daniel J.] Freed, who was in the Justice Department. We ex-Yalies were all friends. Dan was working for Bobby [Robert F.] Kennedy, and Bobby Kennedy took an interest in the problems of poor defendants in the criminal justice system and told Dan to work on these problems.

On the other hand, he didn't give him a lot of new staff, so Dan [Laughs] was able to negotiate a consultant contract for me to help him out. By this time, the youngest one of my five kids was in kindergarten and I was able to get out of the house. I would go down to DOJ [Department of Justice] in the morning and I'd get home by the middle of the afternoon by the time the kids came home. So I worked on the 1964 Bail Conference; Dan and I wrote the publication for the Conference. After that I did a similar publication

for the Legal Services Corporation and "Sarge" Shriver. I'm trying to go fast now. After that I got appointed to the D.C. Crime Commission by President [Lyndon B.] Johnson. At that time everybody said D.C. was the crime capital of the world. There was a National Crime Commission [President's Commission on Law Enforcement and Administration of Justice] for which I did a lot of consulting work led by Nick [Nicholas deB.] Katzenbach and Jim Vorenberg, but there was also a D.C. Crime Commission on which I was a member. I was a staffer—not a full-time staffer—for one and a board member for the other.

By then I worked for the Kerner Commission [National Advisory Commission on Civil Disorders] on the riots in 1968, and on the Violence Commission with Lloyd [N.] Cutler—mostly dealing with the effects of poverty on violence and civil disorders. In 1968 all my Democratic friends disappeared with the election of Richard [M.] Nixon, so I had to go back to square one. Dan went up to Yale and other people I worked with disappeared into the private sector. So, because I'd worked on a theoretical level on the poverty issue, I thought it might be a good idea to actually see what went on at the ground level, and I became a regular staff legal services lawyer here in Washington for a couple of years.

Q2: At the Legal Aid Society, or—?

Wald: No, the Legal Aid Society was the voluntary society. No, this was one of the first Legal Service Projects financed under the OEO [Office of Economic Opportunity],

Johnson's War on Poverty program. There were several others all over the United States under different local sponsorship, but getting OEO grants.

There was a real difference between the old Legal Aid societies and these new Legal Service agencies. The new breed were much more progressive—you might even say much more aggressive. For instance, one of the first cases I had—at this time remember I really had no courtroom experience. I'd done all this policy stuff and written reports, but I hadn't done the gritty work with real cases and clients. I did do a lot of gritty work in those two years at Legal Services, and one of the cases I had to argue was the right of poor women in the District of Columbia to go *forma pauperis* on divorce cases. Joe [Joseph M.F.] Ryan [Jr.], a good Catholic who didn't believe in divorce, headed the family division; it was the domestic relations branch in the local Superior Court. He had said that women could get *forma pauperis* for a separation, but not for a divorce.

Q2: But not for a divorce. Interesting.

Wald: On top of that, for a poor woman—it wasn't just the *forma pauperis* filing fees but under the local court rules she had to pluck down a hundred bucks—and I'm talking now 1968—pluck down a hundred bucks in advance to pay the contingent fees of the other side's lawyer if she lost.

Q2: Right, right.

Wald: The Legal Aid Society would not take the case for a woman on divorce; it would only take the separation cases. So we took that issue head-on and of course lost in the local courts. Remember this is before the 1970s D.C. Court Reorganization Act. The local courts were not in my view top caliber—they were pretty conservative as well—so we at Legal Services never won anything at the local level—not landlord/tenant, or credit exploitation or family law cases. I did some work with Florence [W.] Roisman on landlord tenant cases but we seldom if ever got anyplace locally. Fortunately at that time had a *certiorari* situation where when you got through the local Court of Appeals you petitioned over to the U.S. Court of Appeals the same way you would petition the Supreme Court, and at that time in the federal appeals court you had David [L.] Bazelon and [J.] Skelly Wright, Harold Leventhal, Carl [E.] McGowan, Spottswood Robinson—a progressive's dream team—so that's where we won our victories for poor people. In my divorce case I petitioned over to the federal court across the street, and argued and won that case.

Q2: Divorce.

Wald: Yes, the divorce case. I also worked with Florence Roisman—who was a real tiger, still is—on the *Edwards v. Habib* retaliatory eviction case. I didn't argue it but I worked on the briefs in that and several other cases I also did a jury trial in juvenile court. Juveniles had jury trials then in criminal cases.

Q2: Really? Interesting.

Wald: Yes. I did a jury trial before Orman [W.] Ketcham, a judge on the juvenile court involving the alleged rape by a young black seventeen or eighteen-year-old—very untutored—and the alleged victim was a very well-educated young teacher in a private school whose parents were prominent members of society. I did the trial with another legal service lawyer. The judge called us in and said he was a classmate of the victim's father and did we want him to recuse himself?

Q2: The alleged victim's father.

Wald: Yes. To have him recuse himself would have given us the other judge, who was much more conservative, so we said no. I have mixed thoughts about it now. Certainly the young defendant deserved a defense and he never admitted that he had done it, but there was a lot of evidence he did and that jury may have been swerved by the racial divide. But we did get him acquitted, and that was our job.

After two years in Legal Services I left along with several other key staffers in the test case unit. Legal Services was going through a bad time too because we were getting a lot of Black Power stuff at the time. Legal Services then was under the umbrella of UPO [United Planning Organization] and we were getting a lot of flack on the basis that—and it was true—that we were mostly white. Some of it got nasty. Most of the people in our unit left. Florence left. I left too because there was—you know, if that was the route they

wanted to go, fine, more success if they could do it, but we didn't have to hang around and be beaten up in the process.

Then it was the beginning of the public interest movement and several people I knew were just forming the Center for Law and Social Policy—Charlie Halpern and Bruce Terris. I went to work over there. I took a short stint off in 1972 to work on the [George S.] McGovern-Shriver campaign, but then I came back. Then the mental health law project started out as part of the Center for Law and Social Policy, but then moved away as an independent NGO [nongovernmental organization]. By that time—I skipped one step. One of the things I'd done way back in 1968 or so with Peter [B. Hutt] who was then, and still is in fact, at Covington—was a book on dealing with drug abuse. In those days drug abuse was heroin primarily. The book was financed, sponsored by the Ford Foundation. As a result of that project, I and a woman from Bryn Mawr were elected as the first two women on the Ford Foundation board.

Q2: Oh, really! I didn't know you served on Ford.

Wald: Yes, I was there from 1972 to 1977. I left when I went into the [James E. "Jimmy"] Carter [Jr.] administration, but I enjoyed the Ford Foundation years and in that capacity I made some trips abroad. In fact I did a five-week trip to Europe, Africa, and the Far East for the Ford Foundation, so that was sort of my beginning education in foreign affairs. I'd been in Europe one summer in law school on one of those student

things where you get on a student ship, but otherwise all my work had been in domestic law.

Q1: So this is the beginning of your international experience.

Wald: Yes. I was a member of the international committee at the Ford Foundation. Let's see, okay, I got us up to 1977. In 1972—I told you I worked on the Shriver campaign, McGovern-Shriver. And in 1976 I did some work—not high-level work, but some task force work on the Carter presidential campaign for Stu [Stuart E.] Eizenstat. Carter of course had promised that he was going to put more women both on the courts and in positions in the government, a promise that he fulfilled. Right from the start he had a team working on finding qualified women for agency and judicial vacancies. Margaret McKenna led with the effort—she's the one I dealt with. By the time that Carter was elected and was beginning to pick his cabinet, she had a long, a long list of women. I remember when I went down to interview with [Griffin B.] Bell down at King & Spalding in Georgia, in Atlanta, there were like seven other women that [Laughs]—

Q2: In the room.

Wald: —most of whom ended up some place in the Carter administration. As a result you had I don't know how many general counsels who were women. There just were a lot of them. It was unheard of. There were two positions in the Department of Justice that went to women—I got Legislative Affairs and Barbara [A.] Babcock got Civil. It's sort of

funny how these things happen because I didn't have any background in Legislative Affairs at all. I'd testified a few times for Legal Services—in those days Legal Services could actively support legislation—and I did a lot of testifying for other NGOs on the D.C. Courts Reorganization Act of 1970 and a few other things—but I didn't have what you call real legislative experience. I didn't lobby or draft laws, though in my cases I had read a lot of legislative history.

Apparently Bell had already decided who he wanted for several positions—people he had known or worked with. On the other hand, strangely enough, although clearly he was much more conservative than I, we sort of got along on a personal level, so he told John [M.] Harmon, "I just want her in something." [Laughter] "Find something. I want her in something." Legislative Affairs was a very small office. [Laughs] The learning curve was straight up on that.

Q2: Sky high. [Laughter]

Wald: Fortunately, I guess, I was told at least by some of the staff that my predecessor had not been over-energetic. He didn't always answer his phone calls.

Q2: So you could only go up.

Wald: By dint of working very hard—the staff did not appear to be used to a hands-on boss—we changed course. We had to do all these routine requests that came in and those

were in the hundreds, that came in from all over the Hill for comments on thousands of bills, significant and not so significant. We'd have to go to the substantive branch in the department and get a basic draft, and then add anything or subtract anything that might involve other parts of the department or the administration's policy. The final product would go out under my name, but most of the substance would have come from other offices or departments.

Q2: Thematic—

Wald: Yes, from the substantive departments, although once or twice I would send something back because it just didn't seem right or logical, or I would refuse on my personal convictions. I think I refused to sign a couple on that basis. But the main subjects involved issues the attorney general wanted or the president wanted to get through Congress—or not. That was the routine work. There was some real, true lobbying to be done as well and in that realm I had to learn hard lessons from scratch.

The first time something along those lines came up, Jim [James W.] Moorman had just been made head of the environmental division of DOJ. It involved one of those last minute amendments on a bill that the DOJ hadn't had time to do preparatory work on and Jim felt it was just very wrong and we had to stop it. I went to my staff people and some didn't even know how to get to the House [U.S. House of Representatives] floor.

[Laughter] They didn't know where it was. They had not been used to much direct lobbying in Congress. So Jim and I went over there ourselves [Laughs] and just tackled

Congress cold as they came out of the door of the committee room. It was on the job learning for sure. Anyway, I was there for two and a half years. There were some ups and downs. Some of the legislation we passed on my watch I encountered in later facets in my career, like the FISA Act [Foreign Intelligence and Surveillance Act of 1978], which I am working with now thirty-five years later in my current job with PCLOB [Privacy and Civil Liberties Oversight Board].

Q2: Hmm, that was part—

Wald: Yes, and we thought we were doing a great thing when we passed it. I have some questions in my mind now [Laughs]—not about whether you needed some kind of control but whether we had any conception of—

Q2: What was coming.

Wald: Yes, what was coming down the road so far as NSA [National Security Agency] and technology was concerned. There was also some legislation we passed dealing with exchange of American and Mexican prisoners; We did this other one [Laughs] that gained us probably no great core of admirers—the special prosecutors act [Ethics in Government Act of 1978]. The administration wanted that passed coming on the heels of the Watergate scandal, which had involved so many highly placed Nixon officials and Attorney General [John N.] Mitchell himself.

Q1: Can you tell us about that a little bit more, that particular experience?

Wald: As I said, it resulted from what had gone on in Watergate and it was part of the administration's priorities to get it passed. [Abraham A.] Ribicoff was the person who was shepherding it through the Senate and we worked mostly at the Senate level. Liz Holtzman I think was heading the effort in the House. We thought it was a good thing based upon the Watergate experience. We were thinking about the way all the prosecutors got fired in the Saturday Night Massacre. We wanted there to be a special prosecutor who was immune from firing for political reasons.

Indeed I never became as furious a detractor of the whole notion of a special prosecutor as other people later did after the [Kenneth W.] Starr experience. That turned out to be different from the earlier experience. You're always fighting the last war. We were fighting the war of the Saturday Night Massacre—the eventual demise of the special prosecutor law was a fight against the Ken Starr-Bill Clinton episode. There were a bunch of special prosecutors in between who behaved admirably and usefully. I thought that Larry [Lawrence E.] Walsh, who led the Iran-Contra investigation, did a good job under difficult circumstances. I had some dealings with him, and I respected him.

Now the political climate is definitely against the notion of a special prosecutor. In Walsh's time, the cards were against his getting many successful prosecutions because the Senate had insisted upon calling Oliver [L.] North and [John M.] Poindexter and various people to testify before the Congress, and in so doing immunized them from further

prosecution. The whole question of how much immunity they actually gave to them became the essential question as their prosecutions by the special prosecutor were challenged in court, and Walsh lost that in the courts. We're talking the late 1980s now. The courts—the D.C. Circuit particularly was preponderantly a [Ronald W.] Reagan-[George H.W.] Bush appointed court. I actually dissented from the Oliver North case and [Abner J.] Mikva dissented from the Poindexter case. But in the end the outcomes were fairly predictable. [Laughs] The idea that political events are never a factor in court s is not always a realistic one.

In 1979, with heavy support from Bell, Carter nominated me to the D.C. Circuit. I should say that in my legislative work for the DOJ, we passed the Omnibus Judgeship Act of 1978, which created dozens of new slots on the federal district and circuit courts for Carter to fill. I got confirmed only after a somewhat stormy confirmation process. The Republican right wing challenged me as "anti-family" even though I'd raised five kids and taken ten years off to do it—in part because in the drug book I'd written about drug education in the schools and they said, "No, no, that's a family function," which is ridiculous now. Drug education is all over the schools and should be. The other thing was I'd written a couple of things on a juvenile's right to court decrees for health care and things like that. They said that was taking parents' prerogatives away. Anyway, we got through that eventually, though it was extremely stressful at the time. They went after Mikva at the same time on gun control. They were getting tired of watching Carter get to put so many new judges on the federal bench

Q1: Ah.

Wald: By the time I came up, the Republicans also had more power in the Congress, and as I said they were getting tired of seeing one new Carter judge after another, although actually he only had two years in which to appoint because the act passed in 1978 and he was voted out of office in 1980.

Q2: Was he able to appoint the majority of those—?

Wald: He was able to appoint a whole bunch of women, as you know; many of those women are now or have been the chief judges of their Circuits. Our generation is obviously passing off now, but a whole generation of women chief judges—Mary [M.] Schroeder, Stephanie [K.] Seymour, Carolyn [Dineen] King, Dolores [K.] Sloviter, myself—were originally nominated and confirmed as judges in those two years. Ruth [Bader Ginsburg] came on in that period. Anyway, there were lots of women. I was on the Circuit for twenty years.

Q2: Can I ask you something about the confirmation process? How long did that take?

Did that affect you in any way in the sense of how you dealt with those challenges?

Wald: I don't have the month. Let's say it was March or April of 1979. We got our hearings in July and my vote came just before they went home for the August recess, so it was really only four or five months. Ab Mikva had to wait over the August recess.

Although we were nominated at the same time he didn't get confirmed until September or whenever they came back.

Well, it confirmed my notion how political the process was because it was fairly ridiculous in my case. Fortunately enough good people came to the fore; I had a panel of D.C. bar presidents that testified in my favor. Bob Jones [III]—the evangelical right wing leader—came up from Lynchburg and he testified and said I was an "instrument of the devil."

Q1: Oh, my God!

Wald: Birch [E.] Bayh [Jr.], who was chairing the Senate Committee turned to him—he and said, "Have you ever met Mrs. Wald?"

He said, "No."

He said, "Why don't you turn around and look at her and then say she's an instrument of the devil?" [Laughter] Then they turned to my youngest son—we were told to have all the kids there, who were not happy to have their summer vacations disrupted at a moment's notice. Bobby [Robert C.] Byrd was the Senate whip at the time and said, "We either have this vote this afternoon, or it goes over," so we had to grab everybody up fast. Anyway, when the hearing was over a reporter said to Tom, who is my youngest son, who was then in high school—and this was the 1970s. We made him wear this corduroy

suit in late July because it was the only suit he had. He was sitting there [Laughs] grimacing the whole time. When the reporter said, "What did you think when they called your mother an instrument of the devil?" Tom said, "Well, she burns the lamb chops but otherwise she's pretty much okay." [Laughter]

Q2: Classic!

Wald: But anyway—so we finally get back to the main events here. I'm sorry, that's what happens when you're old.

Q1: That's totally fine. We love the details.

Q2: This is great.

Wald: I didn't actually through my twenty years on the D.C. Circuit have that many cases that dealt with either international law or international human rights. A few trickled through. I'll mention the ones I can think of—we had the famous *en banc* hearing on the Taiwan Treaty [Taiwan Relations Act] as to whether President Carter could abrogate the treaty himself without going back to Congress, which was a novel question of international law.

The one case dealing with human rights and international law that I remember the most was *Princz* [*Hugo Princz v. Federal Republic of Germany*]*—not the Printz case that*

deals with federalism [*Printz v. United States*]. This was about an American citizen who was in Germany when the whole Holocaust thing began. He was detained and made to do forced labor, kept in a labor camp—but he wasn't killed obviously or he wouldn't be suing. He was made to work in what was then the IG Farber Company on munitions. He tried to sue later on under the German Reparations Law but they found him ineligible—not because it didn't happen the way he said it happened, but because he fell under some exception. So he was suing here in our federal courts. Of course Germany raised the Foreign Sovereign Immunities Act, which gives foreign states immunity from civil suits except under certain exceptions, mainly related to conducting business here in the U.S. I sat on the panel with Doug [Douglas H.] Ginsburg and [David B.] Sentelle and I dissented. I wrote a long dissent, which cited that first article that had been written by your cohort at American.

Q2: Diane [F. Orentlicher]?

Wald: Diane, yes. Her first article on the subject of war crimes.

Q2: "Settling Accounts"?

Wald: Yes. But anyway, saying it was basically a war crime so it should be an inherent—it wasn't a specific, that's for sure—an inherent exception to the Sovereign Immunities Act. Well, needless to say my colleagues were never going to buy that one.

One interesting thing is, the clerk I had that year that did a lot of work on it was Caroline [D.] Krass, who's now the general counsel of the CIA [Central Intelligence Agency].

Q2: She was your clerk.

Wald: Yes.

Q2: Oh, interesting.

Wald: She did a great job. I used to participate in weekend seminars for judges on international courts but really my engagement in foreign law was minimal so far as my court work was concerned, but there was another aspect of my life that did involve me intensely in international law. Once we had the breaking apart of the Soviet Union, then CEELI, which is the ABA [American Bar Association] Central and Eastern European Law Initiative, began sending lawyers and judges to the newly emerging countries formerly in the Soviet empire for a week, ten days, to help them in creating their own independent constitutions. I did a lot of such trips, so I really got to know that part of the world pretty well.

Q1: What kind of work were you doing on the ground there?

Wald: Well, you would get constitution drafting; we did seminars for new legislatures that were being elected. We did critiques of the draft laws and constitutions they were

coming out with based upon some of our experiences here. We talked to judges over there about our concepts and procedures in judging. I worked in Hungary a couple of times, Bulgaria a couple of times, Romania a couple of times, Lithuania—the Czechs a lot of times because they were in the forefront, first when it was Czechoslovakia and then when they split about it was Slovakia and the Czech Republic. Toward the end of the decade I was going to Serbia, Croatia and Bosnia.

I had an acquaintance with that area and with some of the political events that were going on inside the countries. It used to be a joke at the court, though I hasten to add I would only go when I didn't have judicial work, but I did do a lot of travelling during the 1990s and my colleagues joked that I would likely try to have the Judicial Conferences held in the Ukraine. Although I didn't do direct work on atrocities or war crimes, I kind of knew what the set up was in those countries—specifically as to Bosnia. I went to Sarajevo and to Belgrade and Zagreb couple of times, and later on I went to Kosovo, but that wasn't until actually after I had been to the ICTY. Anyway, that gets up to the ICTY finally. Do you want to ask some questions about that portion before we continue? I'm going to go get a drink of water before we do part two, but go ahead, ask your question.

Q1: What was the response of these local judicial systems in Central and Eastern Europe when the ABA was sending this initiative over?

Wald: Initially it was very plus. Later on it became a little more mixed. A little of muted "Here are these ten day wonders coming in." In the beginning, the leaders and democratic

activists were actually quite grateful for our help for a couple of reasons. One, you had new people in the legislatures. You had these new people coming in and reorganizing the parliamentary system. You had new people coming into the executive and drafting—there were like four different constitutions drafted in a particular country in five years. So they were eager to hear about others' experiences and even suggestions. They didn't necessarily buy everything; they certainly never bought our presidential form of government. They did appear to be buying the notions of independent judiciaries and constitutional courts. They did seem quite ready to listen to and talk about different ways of doing things.

Later on there's no question. The whole business came up of instead of doing the talking heads, it's a more profitable way or more useful way to go in and subsidize the local people to do the thinking and drafting rather than coming in with your own "experts." Actually, one area they really did seem to covet specific direction—and I think have benefited by our help is court management. In many of these places they have no kind of court management system, court record system. There were no records; there was nothing. So some of the judges sent over were managerial judges. Often the judges in the newly emerging countries didn't know the basics of setting up a record system, which you need if you want to go up on appeal or transfer cases from one court to another.

There were people who went over and set up the systems for appointing defense counsel and for paying defense counsel. I would say that CEELI's efforts were a plus by and large. I don't remember anybody ever being nasty or dismissive of us, but I do recognize

it gradually began to change—"I think we have to do our own stuff." Hungary changed a lot; Hungary was sort of the wave of the future in the beginning. I didn't just go with CEELI. I went over with the [George] Soros NGOs a couple of times—and of course those resource-poor countries liked the notion that Soros had some money to give them too. But now Hungary, I understand just from reading the papers, has clamped down on democratic freedoms, which is too bad.

[INTERRUPTION]

Okay, so first I'll just tell you how I got to the ICTY—again, an instance of the strangeness or the coincidental nature of the way things happen. Actually, when the ICTY was first formed way back in 1993—I was always interested in it because I was doing so much traveling back and forth to Eastern Europe but I didn't have any direct line into it, but—

Q1: But you were following the breakup.

Wald: I was following the new court. I was following it in the paper and I was following it online. So many people thought it just was going to go no place, not just John [R.] Bolton [Laughter] but other people as well. One of the newspaper articles talks about how it had been called a "fig leaf." I remember talking to the person—Conrad [K.] Harper then had the State Department counselor job, the one that Harold [H.] Koh had subsequently—. I knew Conrad from we worked together on an ABA journal and on the

ALI [American Law Institute] Council, so he did call and ask me if I would be interested in becoming the American judge on the court. But it was just not the right time; this would have been 1993 or so.

Q2: Right at the beginning.

Wald: My husband Bob had just had a serious heart operation—well, more than a year before—but still I just didn't feel comfortable about going abroad for several years. It just wasn't the right time for me to do. So, I didn't, but I continued to follow the court. Now I fast forward to 1999. Bob was going to the grocery store [Laughs] and he ran into, just by chance, Madeleine [K.] Albright's special assistant, who had previously worked for Birch Bayh during my confirmation process. She said offhand, "Do you think Pat would be interested in going on the ICTY?" Gabby [Gabrielle Kirk] McDonald had been there since 1993 and this was her second term, but she had, as I understand it, some problem with her legs so she was wearing a brace, and I think it got increasingly painful so she was leaving in the middle of her term.

Madeleine of course took a special interest in the ICTY, and had from the beginning. I knew Madeleine a little bit from back in the Carter administration. She was [Walter F.] Mondale's national security person back then and we dealt with her. Anyway, Bob said, "I don't know, you should ask her." So she asked me. Things were quite different by now; Bob was okay health-wise at the time and my kids were all gone off to college or careers actually. So we talked about it and I thought, "Gee, I know it means being away," but I

had a yen to do it—one, I had already put in twenty years on the court, including being a chief judge for the last five. I have to say, there had been tensions on the court, primarily in the 1980s as the court changed from a predominantly liberal Democratic majority to a pretty strong conservative Republican one. We had eleven Reagan/Bush appointments in one decade.

Q2: Wow!

Q1: That was a very eventful time in the court.

Wald: Yes.

Q1: There were pretty high profile—

Wald: There were high profile cases.

Q1: —confirmation hearings.

Wald: Yes, there were a couple of our judges who went on to the Supreme Court and a couple who didn't go on to the Supreme Court.

Q1: The "Borking" of [Robert H.] Bork.

Wald: There were Bork and Doug Ginsburg's unsuccessful nominations But we did get successful ones as well—[Antonin G.] Scalia and [Clarence] Thomas and later on Ruth Ginsburg's. Apart from those, Starr, [Laurence H.] Silberman, [James L.] Buckley, Sentelle, [Karen L.] Henderson, [A. Raymond] Randolph came onto the court during the 1980s and early 1990s. After Clinton came in, we got three new ones—Judy [Judith Ann Wilson] Rogers, Merrick [B. Garland] and Dave [David T.] Tatel. The balance had come back a little bit, but things were often tense still. When we issued the Race and Gender Task Force Report in the mid 1990s, the entire cohort of Republican circuit judges disaffiliated themselves from the entire report, though virtually indistinguishable reports were coming out of the other circuits unanimously.

Q1 and Q2: Wow!

Wald: They just were adamant. So they disaffiliated themselves in a long dissent, but the Republican and Democrat district judges stuck with us. It was not a Republican/Democratic thing on the District Court. They were pretty much together.

Q1: Where do you think that really strong partisanship came from? Was it the fallout of Watergate and the reaction to that?

Wald: Well, I don't know. Some of it I think, despite all the talk, is inevitable because of the political nature of the nomination and confirmation process. The Republicans especially pick strong ideologues; Democrats have never learned their lesson. [Laughter]

But anyway, they pick strong ideologues and sometimes that carries over into the decision-making. It does. There's no question about that.

Q2: Obviously, in some cases.

Wald: I have not seen our District Court—even through different periods—partake of this phenomenon. First of all, they run their own courtroom, so it isn't like a panel where it's two and one. Somehow they kind of ally—Carl McGowan used to call them the "loyal oppositions" [Laughter]—they ally themselves with each other. Anyway, I have to say the court in the 1990s continued to be divided. It culminated in a portrait ceremony for one of the retired Democratic judges, which not one Republican-appointed judge on the Court of Appeals showed up for. In any case, by 1999 I was ready to move on.

Q2: To move on.

Wald: I was ready to go. I put in my time.

Q1: You were on the bench at the time when Yugoslavia was breaking up and these wars were happening.

Wald: Right.

Q1: Were you following this? What was your reaction?

Wald: I was only aware from the newspapers. I had gone to one or two of the Balkan states. The Dayton Accords had been signed. I went over to Sarajevo—I didn't go over during the time the battles were going on—and to Belgrade.

Q2: What were your impressions of Sarajevo when you went?

Wald: When I went there, I can remember the first time it was winter and there was no heat. There was a little heater—the Soros people had their own little heater we put in the edge of a room and it was still freezing. We got off the train and we had to stay in the hotel where all the battles had taken place. It was Sniper Alley. Half of the windows were broken in the hotel. There were no lights; you had to go up the stairs with a flashlight. There was one light at the end of a hall, but it immediately went out before you could reach your room. It was very scary. I was with another guy from CEELI and he was just down the hall, but hardly anybody else was in the hotel. It was really quite spooky.

Q2: Was it in Baščaršija? Were you down in the old downtown?

Wald: Yes, the military aircraft were still technically taking people in, but there were no tourists coming in at the time. The other thing is they did tell us, despite the fact that the war was over, there were still some shootings going on. They told us when we got off the plane in Sarajevo—we had the badges around our necks. God, this is all coming back to me now. We came on a military transport out of Zagreb so we were strapped in against

the bulwark with flak vests and no windows during the entire flight from Zagreb to Sarajevo. I remember Christiane Amanpour and a few other reporters were on the same plane. You just went over, and they closed things down, and you can't look out until you land. You still could only get in there if you were cleared by the government; you couldn't just decide you wanted to go there at this point. This is right after the Dayton Accords. So when we got off they said—there were sandbags piled up on both sides of a path from the runway into the terminal—they said, "Get off and walk as fast as you can. Don't stop for anything. If your badge falls off don't try to pick up anything, just walk as fast as you can," because there were apparently still snipers around.

Q2: There was the tunnel under Sarajevo that came right out at the airport, right?

Wald: Yes. The other thing is we met with a lot of Bosnian judges. It was interesting, some of the stories they told us. They took us to the bridge in Sarajevo and they said that the day after the war had begun that their courts, which before had Muslims and Serbs on the court, on the day after war was declared, no Serb judge showed up. They were gone in the hills, and of course the Serb forces were in the hills. They showed us this ancient library of the most famous old books, which the Serbs bombed specifically, though it had no military value. They said for three days the print from the old books filled the air throughout Sarajevo.

Q2: It burned.

Wald: The newsprint was all over the air.

Q1: In the air, right.

Wald: Yes. There were a lot of Bosnian women judges because under the judicial system in Eastern Europe, judging was not considered the highest form of service. It's interesting, they told us that very often they had to walk to the court because transportation was totally disrupted, and they said they made it a point of honor that they would not only walk but they would wear their best clothes every day and go to the court to show that they were carrying on.

Q2: That library was under renovation for the last decade and it was recently opened maybe this past summer. I went to it in October on my last visit to Sarajevo and it looks beautiful. It's completely reconstructed.

Wald: I'd love to see that.

Q2: None of the holdings are there. I think maybe eighty percent of the holdings were destroyed. A very large number—

Wald: Yes. Oh, I know.

Q2: —but the remaining holdings are in another location, and it serves—there's one or two beautiful grand rooms that serve as a city hall kind of function. But it's beautiful.

Wald: It would be great to go back. I haven't been back since I don't know, sometime. In the early 2000s I went back once after I left the ICTY, but that was just a few years after I had left. So anyway, that's what I remember most about that first visit, was it was very cold; there was no heat; the hotel had no lights; it was scary sort of, and everybody was just trying to figure out what was going to come next.

Q1: So was CEELI attempting to set up these systems of justice immediately following the end of aggression?

Wald: No, they were working with all the local people to reconstruct a better system. We had local judges and prosecutors working with us. Actually, one of the groups I worked with was a Soros group, as opposed to CEELI that I went with. I made a couple of trips, and they actually were willing to put money and technical experts into it to find out, figure out what were the greatest needs and try to help with the financing. CEELI's contribution was primarily advice.

Q2: Technical assistance.

Wald: Yes, that kind of thing. There was a question of who were the people that were going to now take over the government. Still, there were certain basic services like the

courts, which would have to run again somehow. They were also drafting a new judicial law in Bosnia and we talked a lot about that, about whether the old judges would resume their jobs—especially the Serbs who had gone off during the war. It's the same problem that we met in Czechoslovakia, when it was still Czechoslovakia, and throughout Eastern Europe—forget and forgive or purge.

That was the so-called purgative problem as to whether or not you let people back who had fought very hard on the other side of these wars or civic revolutions, or who you thought had done some really bad stuff in the war, or ostracize and even prosecute them. Of course, as the war crimes tribunals demonstrated, some really bad stuff had been done in Bosnia, so whether you let former enemies be eligible for positions in the new government, including judges, engendered a big debate—how far you would go along the lines of "Let's all gather around together" As opposed to "People should be accountable for their actions in the war. Somebody should pay for the terrible wrongs done to the country and innocent victims" There were a lot of these issues going on.

Okay, to get back to the ICTY, I decided that I would try for the job, but I had to make up my mind quickly because Gabby was leaving quickly. I did check to see whether it would be possible for me to stay affiliated with my federal judgeship position in some way. I was already eligible for senior status so I wouldn't have to forfeit my federal pension. I would have liked to come back after my ICTY term and serve on the Circuit again, but they said the answer was no, I couldn't stay affiliated with my current court. I had to retire completely from the court.

Q2: You couldn't be on extended leave or something?

Wald: I couldn't, no. State court judges can, as you know. Some of them have gone on to various international courts and then returned to their old jobs on domestic courts, but they said I couldn't. I thought that was a short-sighted kind of thing because they let senior federal judges do things, like Judge Silberman running the president's WMD [weapons of mass destruction] commission and Irving [R.] Kaufman running a commission on crime—but anyway I had to decide fast, and I still had my pension rights, which was important .

The appointment to the ICTY is made not by the president, but in my case by the secretary-general of the UN [United Nations]. It isn't a court, as you well know, where each country in the UN says, "Alright, this is my guy," because there aren't enough spots. Actually in this case, because I was replacing Gabby, it was an appointment that was made by Kofi Annan, the secretary-general, rather than by the General Assembly as in other ICTY appointments. I had to go up with our State Department representative and talk with Kofi Annan in New York. I had never met him before. I've subsequently worked with him on some other matters. I had known [Richard J.] Goldstone—the first ICTY prosecutor—before, but when he'd been a South African judge and made several visits over here. But in 1999 he was no longer the prosecutor.

Q2: It was Louise Arbour.

Wald: No, she left just before I came. We never overlapped.

Q2: Oh, interesting.

Wald: Yes. I know her, but we never overlapped—although I had met her when she was a Canadian judge.

Q2: It was Carla [Del Ponte].

Wald: Yes, Carla had just come. She was new too. We came roughly in the same period.

Q2: So you finished out Gabby's term?

Wald: Yes.

Q2: She was 1993-1999

Q1: You were 1999 to 2001.

Wald: Yes, I came back in December of 2001, though I continued some long-distance work on cases into 2002.

Q1: You were nominated by the State Department, right?

Wald: Well, yes. They said, "This is our bailiwick"—and of course Madeleine Albright took care of that. I think it had to get *pro forma*, go through the White House, but it wasn't basically the president who made the initial choice; it was the State Department—at least in my case it was her call.

Q1: And then the meeting with Kofi Annan.

Wald: I can't remember the sequence in which it came, but it was a sure thing I was the nominee of our government at that point because I went up with the American State Department guy, from our office at the UN. That was a very pleasant meeting. Hans Corell, the general counsel to the secretary-general, was there.

Q2: Oh, wow. Sure.

Wald: We had a very pleasant visit and apparently they had no objection. Meanwhile, I was having some phone conversations with Gabby about logistics. I went overseas for a CEELI meeting that was held, not at The Hague but in Prague while John Shattuck was the ambassador. My husband Bob was with me. That was in August when the process is first beginning. We had gone up from Prague and taken a trip to The Hague. I had met Gabby in person and she'd taken me around the tribunal, so I knew the lay of the land. I met just one or two judges because it was August and a lot of them were away. We

agreed I would take over her flat, which was across the street from the court. It turned out to be a good arrangement. I was going to be living alone. Some judges had their families with them, some didn't, but being alone I didn't really want to have a long hard trek everyday, every morning. You know how it is in The Hague—half the year it gets dark at three o'clock in the afternoon—

Q2: And windy and cold.

Wald: Yes, and ten o'clock in the morning the sun comes out. I ended up making a deal for most of her furniture too.

Q1: Taking her seat in more ways than one. [Laughter]

Wald: Yes. Actually she left the day after I got there, so there was no transition period. That was not ideal, but she had her priorities, so there was nobody to break me in. The person who was most helpful to me was [David] Tolbert because he had been her chief of staff. I hadn't known him before but he was very helpful to me through that whole first period.

Q2: Did he stay?

Wald: He left.

Q2: Oh, okay.

Wald: It was during my first year, he left. For several months after I got there he continued on but in a different capacity—no longer chef de cabinet. Claude Jorda was taking over the presidency of the tribunal from her. In fact, the ceremony in which they swore me in wasn't a big ceremony; it was sort of an afterthought. The biggest thing was Jorda taking over from Gabby as president of the ICTY. I was like a footnote. [Laughter] That took place a day later, after I got there, so it was kind of a wild transition.

The most valuable thing I learned from Gabby was that I could, despite the UN's very rigid protocols, have one legal assistant of my own choosing. Technically, the president appoints all of the staff including the counselors to the judge, but in reality you got to pick one for your personal assistant. I had recruited Jenny [S.] Martinez, who had been coming off of Steve [Stephen G.] Breyer's clerkship. She had clerked for [Guido] Calabresi before then. Anyway, she was interested in serving abroad, although she didn't have any special experience or linguistic background. The two official languages at the tribunal are French and English, and neither one of us spoke or read much French. I had some elementary French from high school and she had the same thing, although while we were there she took some evening French lessons. But she was terrific. She was very smart, as her subsequent career has shown; she's a tenured professor of international law out at Stanford [University]. But back then we were learners on the job. We came in cold.

Q2: She started with you from the beginning?

Wald: Yes, yes.

Q2: Your panel was the Portuguese judge—

Wald: Yes. Here's the way the assignments went. Jorda takes over. I'll tell you this.

Tolbert tells me—and I only know this from him, and I believe it—that he or Gabby maybe, or one of them had recommended to Jorda that I be put on the appellate tribunal. There was a vacancy on the appellate division and I had twenty years of appellate experience.

On the other hand—here's where your ye old politics shows up internationally as well as nationally. [Antonio] Cassese was held in high regard by me as well as other people there, and he was leaving. [Fausto] Pocar was coming over to take Cassese's place but he wasn't coming for a couple of months. He had no judicial experience; he had all of the diplomatic/academic experience but no judicial experience.

I guess they decided—the powers that be, and this is the way it continues to this day—that Pocar would get the appellate spot and I would go on the trial bench even though I had no trial court experience. In my view, the chief judges have much too much power in terms of assigning judges and assigning cases to particular panels. It was decided in any case that they would save the appellate place for Pocar.

Q2: For Fausto. For Pocar.

Wald: For Pocar. Meanwhile, there was no place for me because there was no vacancy in the trial court—Gabby had been on the appellate court—because the chamber to which I was assigned were finishing up a case, which had a couple of months more to go. So for the first couple of months when I got there I didn't do anything. I would go to Jorda and I would say, "Isn't there anything I can do?" But he was not responsive. Fortunately, the U.S. ambassador became a good friend and she used to have parties and she'd invite me to them all the time, and I said, "You know, there must be something I could do." Maybe she passed on the word, so they gave me records to read, which turned out to be useful preparation for future cases, but not what I had come for. They kept saying, "Well, as soon as the Blaškić case finishes." So I just waited and stewed.

[Almiro] Rodrigues and [Fouad] Riad were the other judges I would be serving with. It was known as the "French tribunal" because they both spoke French in court. The judges had their preference as to which language they would speak or write in and they both chose French. Neither one of them was French by origin, but French is supposedly the language of diplomacy and they both spoke French and they wrote in French. The chief counselor was picked by Rodrigues, who was the head of the chamber, and he was French as well, so it's this very French-oriented chamber. When I came, they were writing most of their original drafts of opinions and motions in French. I found out later from [David] Hunt—the Australian judge who was probably the smartest one on the

whole court—that various other people before I came had been asked if they would come into that chamber and had turned it down.

So I didn't have anybody there to push my case and Tolbert was no longer in any position to do so, so I ended up hanging around trying to learn what I could for a month or two until we got started up on the trial level and until Pocar came in and took over in the appellate court. It was all managed, and I think that a lot of that still goes on. I think that's one of the deficiencies in many international courts. I don't know if that goes on at all in the ICC [International Criminal Court]. I haven't followed it.

Q2: Yes, the president has—

Wald: In Rwanda some thought it did too. Some judges complained that they were taken off the appellate and put back down in the trial bench on the basis of dissents. Okay, so jumping that, Rodrigues had previously been in charge of domestic relations in the prosecutor's office in Portugal or some such. Actually, he was a nice person but his instincts bent toward trying to conciliate in cases dealing with horrific war crimes. You had these angry, raging victims who did not want to come together. [Laughter]

Q2: This is no reconciliation.

Wald: Basically he was a decent kind of person, and he was a good friend of Jorda's, which worked to my advantage once that decision had been made that I was going to be

in the trial court. But it wasn't until March that my luck turned. In the interim, Rodrigues kept saying, "You wait and see. The chief judge is going to give us a good assignment." Then we were assigned the Krstić case. So actually, in retrospect, I'm grateful for what I thought was a kind of bypass in the beginning because I really got a much more intensive experience by being in two big trials. And eventually I got plenty of appellate experience because in three different cases the person that was designated as part of the appellate panel had to be recused and I took his place. I'm really grateful that I got to experience the heart of the process, but at the time it was a somewhat disheartening beginning.

The other person in my chamber was Judge Riad. Judge Riad was from Egypt. Judge Riad had a long academic background, probably some diplomatic experience too, but Judge Riad didn't have much prior experience as to how a trial was run. In fact, at the confirmation of the indictment in this case he had been the judge—you know the process at the ICTY where you confirm the indictment?

Q2: Yes.

Wald: Sometimes you sent it back because you didn't think they had enough evidence, but if you confirmed it you confirmed it—period, without comment—because you haven't yet tried the alleged perpetrator. Judge Riad, however, departed from the script in a major way that got quoted all over the press about the terrible, bloody, awful, things done—none of which had yet been proved. He would have been recused for that in the United States.

In fact, he really didn't do much of the writing of the Krstić opinion, although he'd been there for seven or eight years. Really he was an interesting guy and he had all kinds of artistic connections and scholarly connections, but not a lot of knowhow about a criminal trial.

Q2: How was it coming into decisions in a panel like that? I mean, both the language challenges and—

Q1: Yes, first there's the language barriers and the complications therein.

Wald: The other two judges spoke enough English so that when we sat down for deliberations we could deliberate. They could speak English at a party just as well as anyone else, but they liked the French better in the courtroom. We had two things—we had translators, so you had not only headphones coming with the translators, but you had a little screen that within seconds replicated the oral testimony translated to your preferred language. You just got used to it. Admittedly, it wasn't ideal, but I was surprised after a while you didn't think about it anymore. This trial went on from March of the first year I got there, which would have been 2000.

Q2: 2000, that's right.

Wald: March 2000. We finally came out with the judgment in Krstić in July of 2001, so we finished trial sometime that spring. The only decisions that were made as we went along were the step-by-step decisions that you get in any trial court—motions to do admit or exclude testimony, protection for witnesses, those kinds of things. Before I came, they had always issued everything in French. After I came, we started issuing in English. [Laughter] The first time they sent me an order it was all in French and I said, "I'm sorry, it's going to take a little while for us to translate that."

They said, "Oh, you don't have to translate it."

I said, "Ah, I think we do." [Laughter]

So they said, "Oh, one of the prior judges"—who'd been on the panel before I came—"she didn't speak much French but she always signed the orders."

I said, "Well, I'm not going to do that." We worked as fast as we could, but they saw the handwriting. They understood English perfectly well, so we ended up issuing most of the stuff in English. I'm not saying that's a plus, but—

Q2: Right, but it was overcome. Did you do any or much oral decision making from the bench? And if so—

Wald: Not too much unless it was necessary—if somebody objected to a question. In the beginning that was hard because we would have to put our heads together and it was sometimes difficult to come to the right decision on the spot. I once went to David Hunt—because whenever I had problems like this I would head for either Hunt or [Richard] May. They were the best two judges and they spoke English and came from an Anglo-Saxon legal background. They knew what I was talking about in saying, "How do you handle this?" or "What do you do to handle that?" I remember Hunt told me that he had been on a panel with another judge and encountered the same problem. He solved it by saying if they really had a disagreement, "We're not going to decide this right now. We'll be back tomorrow morning," and they'd go off and deliberate. Once or twice I did that so we could deliberate further if a quick but wrong decision would have serious consequences for the rest of the trial.

It didn't turn out to be a terrible problem. We didn't have a jury, so you could take evidence subject to an objection and then decide the objection later, and then decide whether you're going to dismiss it. Basically more problems in the actual trials came because the judges under the rules could question and they questioned a lot more than they do in the American system. I did a fair bit of questioning myself. No doubt judges' questions would interrupt the flow of the prosecutors. Mark [B.] Harmon was the chief prosecutor in the Krstić trial and he was pretty good. He is now a judge over in the Cambodian tribunal [Extraordinary Chambers in the Courts of Cambodia], as you know. He knew where I was coming from so he could handle my questions, but sometimes the questions from others had such a potentially prejudicial predicate that it threw everyone

off balance and the defense lawyers would rise and demand a new round of testimony or re-cross to offset the presumed prejudice.

Krstić's defense lawyers were from Banja Luka and they were very straight; they really were good. There were two of them. The younger one spoke more English. Both really were honorable. In some other cases some of them were not so straight. The word circulated that there was a power structure up in Banja Luka that sent a "watcher" to court to watch how the defense lawyers from Banja Lujka—a Serbian stronghold—behaved so they wouldn't spill any secrets incriminating officials still in power there. We did have a situation though during the trial in which the lawyer for Krstić claimed that material that had been sent to him under seal up there had been opened before he got it, theoretically by the authorities. But they were themselves very honorable and professional lawyers—I have to say that about the two of them.

Q2: Pat, you mentioned the idea of being able to ask more questions from the bench than you would here. That's more of a civil law approach to the court management, right? Do you have other examples where things were different than your experience here as a judge? I know you were an appeals judge and that's different already, but—

Wald: I had been a lawyer too. I had been in American trials as a lawyer, so—

Q2: So what was contrary to that expectation given that you had civil law judges with you?

Wald: Well, there was the role of the judge, which in the civil trial is more of a managerial one as to which witnesses are called, etc. The other thing of course was having three judges making decisions during the trial, so it didn't go as fast as it would. Apart from the language—the translation always slows things up—but apart from that, if three judges have to make a decision on any disputed thing, it's going to take a little bit longer than if you have one judge that moves ahead, so there was that.

As to translation difficulty, the translators would often have to render an opinion on something that was disputed and their word was inevitably final since none of us spoke all the languages involved, especially the Serbo-Croat dialect of the witnesses. There was a huge issue in the Krstić case about exactly when [Radislav] Krstić took over from his successor so that the responsibility for later war crimes would attach to the right commander. There was one word—I cannot remember the word now—that had gone out in the announcement of the change at the time it had taken place, and there were two different interpretations of what that word meant, whether it meant "this has been done" or whether it meant "this is—"

Q2: Going to be done?

Wald: "—going to be done." In that case, since it was a Serbian word or a Serbo-Croatian word, obviously we the judges didn't feel qualified to decide. It was amazing, to put that amount of responsibility in a translator, but often there was no alternative. Usually the

important ones went up to the head translator. That was of course something you would not run into in an American system.

Q1: There was also the translation of the witness testimony too.

Wald: Yes, right. I've written several articles that you probably have seen.

Q2: Yes, we've seen some, obviously.

Wald: There was that business of it's like a tripartite type thing—the fact that witnesses invariably were speaking one of the Serbo-Croatian dialogues. In Krstić generally they were interrogated by the prosecutor, which was Mark Harmon and his number two lawyer named [Peter] McCloskey. He was the son of the California congressman. Anyway, he's still over there. One of them would question in English, which would be fine from my point of view because I knew what he was saying; the person would answer in Serbo-Croatian, which had to be—

Q2: Translated.

Wald: —but time and momentum was initially lost because his English questioning had to be translated—say it's a woman witness—for her into Serbo-Croatian. She then answers in Serbo-Croatian, which has to be translated back into French and English. Every part of this thing is just a little bit longer and more stretched out. Apart from the

time alone, the pace, the rhythm is broken. It isn't like *Perry Mason*. [Laughter] Every round has a long time in between separate questions and answers, so perhaps that affects what people say when they have thinking in between each part of the back and forth.

Q2: How about the way in which evidence was put forward and how that differed from your experience?

Wald: It was a bit looser. It was a bit looser that I recall, invariably in terms of things like chain of custody. One thing I remember is during the fighting they took over a precinct or something and they just threw all of the papers willy-nilly into a bag. Later on they culled them and they pulled them out. There was no chain of custody as precise as the way you would have it here. Who knows how many hands could have put stuff in or taken stuff out? I guess we were somewhat accommodating to the wartime circumstances—to the extent if you thought there was some relevant evidence in there, you weren't prone to exclude it on a technicality.

I think we attempted to make sure there were sufficient indicia of validity to the documents we admitted from these mass seizures in wartime, but there were—for instance, a vast amount of wiretap evidence that came in and these people who'd been out there in the field listening—I could still remember—they had these little notebooks, like the kind you buy for your kid for first grade with pictures of Mickey Mouse on the cover, and they had just written down in longhand what they heard. Yes, it could be proved they

were the people who were there. But after that you had to take a leap of faith that they wrote down credibly what they heard or thought they heard.

Q1: It was—right.

Wald: Right.

Q2: You had some indicia reliability, some indicia where they came from—

Wald: Yes, I was certainly satisfied that nobody had purposely planned a deception; indeed if they were going to actually make up the evidence wholly they would have done it a little bit better than the little old Mickey Mouse notebooks that were coming in with. [Laughter] That wiretap evidence was very important in the case. Remember, we didn't have emails in those days or anything like that, so it was those wiretaps that provided critical evidence of orders given or statements made by the defendants and their subordinates. Of course, at a secondary level we were dependent on the translators as to what they said they heard and wrote down. There was no way we could second-guess those.

Over the course of a year and a half—what we did, as you well know probably, is we had two major trials. We went in and out so we'd have two weeks of Krstić, then we had two weeks of a trial involving five of the Omarska prison camp officials, and then we'd go back to Krstić again. Then Krstić had a problem with his amputated leg; he'd had a leg

that had been amputated before in a prior war so he had to be hospitalized for a period on that.

Q2: Were you sitting more often on the other case, on the Omarska—?

Wald: I don't remember the exact dates. Anyway, we ended up finishing them both about the same time. You had Krstić first and that came out in July of 2001. I was going home in that November, so we then had to turn around, and that's the point at which Kelly [Askin] came over and helped us with the drafting of Kvočka. Meanwhile, I was the chief judge on the Kupreškić appeal. By that time Jenny had gone and Michelle Jarvis was—

Q2: Michelle was there.

Wald: —my mainstay on that appeal. It was a very hectic two years, plus I did a couple of others. One was the [Goran] Jelisić case about whether or not the trial court had the authority to dismiss the genocide charge over the prosecution's objection. [Mohamed] Shahabuddeen and I dissented from that holding. The rest of the appellate panel did not want that to be the first genocide trial at the tribunal because the defendant who had been brought up on genocide as well as war crimes and crimes against humanity was a crazed person; he'd gone around playing Russian roulette with some of the prisoners in his charge and made remarks like, "They're like cockroaches. We should sweep the floor with them," kind of thing.

As I said, they indicted him on genocide, but it was clear that the court didn't want that to be the first genocide case that they came down with. They wanted—genocide was still a super crime, a more meaningful case involving higher-ups and planning for the tribunal's first genocide trial case that went to full trial. There'd been a motion at the end of the prosecution's case by the defense to dismiss the genocide charge, and the trial court granted the motion because there were other counts on which if convicted he would clearly get long prison sentences. The prosecution appealed the dismissal of the genocide. I sat with [Rafael] Nieto Navia, from Colombia, on the appeals court, and two other judges who I don't remember and Shahabuddeen and me. Shahabuddeen and I said that the trial court shouldn't have dismissed it, that there was clearly by any standard enough evidence to go ahead with the genocide and the appellate division did not have the right on its own to decide they didn't want to.

Q2: [Unclear] but to move it forward.

Wald: Then there was another case about the admissibility of a dead person's letter.

Anyway, I got enough appellate experience between Jelisić and Kupreškić, which was a real doozey.

Q2: One of the things that David and I had talked about was, what surprised you most about these trials, these mass crimes trials at the ICTY versus any of your experience here—the long experience you had here? The mass victimhood in these kinds of trials

were obviously very different than anything you saw here, but what was the most different or surprising thing once you got there?

Wald: Well, let me maybe come at it a slightly different way. One, as the trials progressed, I was impressed—this is a plus—I really did think, in every major way that I could think of, these people got the equivalent they would get in a due process trial here. First of all, the discovery was greater if anything over there than our discovery rules. Secondly, I know the cross-examinations are odd, but basically they had defense counsel that varied but most of their defense was good. Most of them had a Canadian lawyer or someone that spoke English. I didn't really feel any of them were getting a bum deal or it was a sham proceeding. In fact, if anything, it was too prolonged sometimes. A single trial judge could have made a ruling—boom, boom, boom—and moved on. Here we'd go on for a time but eventually we would certainly seriously consider all the issues, so there was that.

Let me think what was also different. In my mind I wasn't always comparing it. I guess I did feel that it was slower than it needed to be. Of course, a lot of the defendants had been in detention for three, four years, and that was something that hopefully wouldn't happen here in the U.S. Jenny and I wrote an article about that. That changed too as time went on because they did start giving compassionate leave and even pretrial release later on, just as I was leaving. At the beginning, that was un-thought-of—once you've captured a suspect, you were going to make sure you kept him until trial. Now they let defendants

go home during trial even when they use the free time carry on propaganda for their cause

Q1: If it's okay with you, maybe we can come back another time for another session and follow up with some of the threads that were brought up with you at the ICTY.

Wald: Yes. You know what you could do, now that we've gotten all the kind of general stuff out of the way, you could propose some specific questions.

Q1: Of course.

Wald: Alright, let me just say one more thing. When you got through with the trial business and it was time to make a decision and write the opinion, that stage was completely different from my experience here. My experience in the states was, if it's a normal case, you make a decision as to who writes it, and circulate the opinion. There may be dissents, but it's a fairly speedy process. In most cases when I was on the Court of Appeals, we had our opinions out in a couple of months. There seemed to be no expectation at the tribunal that things would go that fast at the writing stage. Now, it was a difference case there because people knew by the middle of the year that I was leaving at the end of the year, so the decision had to be issued by the time I left, but that was not—

Q2: Par for the course.

Wald: —not a regular timeline for them. They were somewhat taken aback. By the time we were writing all three decisions, Jenny had gone home after the first year and Michelle and Kelly were the chief assistants on Kvočka. We kind of initiated new modes on decision-writing. Most of the opinions that were coming out in my time would set out the law first. The template was like a treatise, and then they'd set out some facts and then, boom, at the end, the result.

Q2: Right, done! [Laughs]

Wald: It did not place as much a premium on reasoning how the law fit the facts. as I was used to back home. So we did, at least in the opinions I was involved in, introduce the notion of leading off with the facts, and then applying the law to those facts, and telling why and how you are applying that law to those facts.

Q2: In what way, right.

Wald: So we attempted to do that—and Rodrigues was accommodating. Basically we wrote the facts in Krstić with the help of Jenny and Michelle, most of them in Kvočka too with Kelly's help, and with Michelle in Kupreškić. We farmed out some to other chambers, but we handled a lot ourselves. We knew certain chambers did particularly good work in one area, so they'd take that, and another chamber in another area, and we

put it together. We agreed on the outcome and the other chambers went along with this process.

That happens sometimes in U.S. cases too—a judge says, "This is the way I'm going to come out," and the others don't really care how you get there, but sometimes they care a lot. Even on sentencing—I remember the debate in Krstić's sentencing the question was over whether he should get the maximum—life—or whether the ultimate punishment we could give should be saved for the bigger fish who had not yet been caught—[Slobodan] Milošević, [Radovan] Karadžić and [Ratko] Mladić.

Q2: Yes, you do.

Wald: Yes. First of all, Rodrigues said, "Well, maybe we could just do crime against humanity," and I said, "No, I really think it is genocide," but it was a close question. Riad didn't seem to have a clear preference so finally we decided it was genocide, but we gave him forty-six years, which was in reality a life sentence for him, given his age. The appeals court cut back his conviction to "aiding and abetting" rather than "perpetrating" a genocide, which I thought was not justified, but it kept the genocide holding. But back to our sentencing, when it became clear that this was going to be the first genocide conviction, the question was, what kind of sentence? At that point they didn't have any kind of tradition or precedent or guidelines on sentencing, so we said, "Well—"

Q2: Still don't.

Wald: "—we can only go up to life and there's no death penalty," but Rodrigues said, "There are a couple of them we haven't caught yet"—that was before Mladić and Karadžić—"so we have to save something." [Laughter]

Q2: That was the guideline. [Laughs]

Q1: You have to save it for later.

Wald: You have to save something for the highest. I wasn't really going to fight at that time. I always felt a little bit ambiguous, ambivalent—well, both about Krstić. He was somebody who was brought up in the old honorable tradition of the Serbian kind of things. Now maybe I'm crazy, and he's had some strange behavior since, but I didn't get the feeling he was a vicious thug like some of them were. He had been brought up in that tradition and he had been in the wrong time at the wrong place. He hadn't actively given orders to kill those seven or eight thousand boys and Bosnian men—but he'd let and even enabled it to happen.

Q2: He didn't do it with gusto.

Wald: He hadn't actively said—there was one cable that could be interpreted as saying, "Kill them"; there were other cables interpreted as saying, "Let them go through." He was not like—Mladić there was not the evil, evil person there, but he was in on it. We didn't

have much evidence about Karadžić's role in the Krstić but we had a lot about Mladić's—films and first person testimony. Krstić was not such an obvious villain; he came from an honorable tradition, and he had the amputated leg, and I felt he was one of those tragic figures in history that goes against his better instincts and lets himself be pulled into infamy by his superiors. Of course they shipped him off to an English prison where he was attacked by another prisoner.

Q2: Just one quick follow-up on the Krstić case. One of the interesting developments there was the use of the attack—it was one of the first times that the destruction of cultural and religious property was looked at for purposes of intent, even though cultural genocide has been as much out of the—the drafting of history has been clearly excluded from the definition of genocide. Was that—?

Wald: There wasn't any big debate about it. It was something we put in a draft and no one objected. [Laughter]

If I had been put in a chamber with May and Hunt, I would have been a very subsidiary figure because they had so much more experience, and they had all the same Anglo-Saxon background that I did. Plus, I had really good help. In both years, I had really good help. I was there alone; I didn't have my family. Bob came over every month and we usually took a weekend, went to someplace in Europe, but I had lots of nights and times when I was lonely. So was Jenny. Jenny was over there alone too, and we'd go and get a

pizza, and we'd work. Michelle played the same role, though she did have her husband with her.

Q2: Yes, this is an excellent place—.

Q1: This has been really great.

Wald: I'm sorry about—I'm wandering, but—

Q2: No, no, this is exactly the kind—the oral historian has given me a little bit of background. It's not really intended to be more pointed questions, but more of a conversation.

Q1: Yes, it's your story told your own way.

Wald: Yes, and I am sorry about not remembering all the details of all the cases. It was ten years—

Q2: No, it's fine. Like we said you can go back and—

Q1: You can add in to the transcript.

Wald: That's why, if you want to think about directed questions you want to cover you might remember that we talked about Krstić quite a bit, and we talked about Kvočka some. That too had some enigmatic aspects to it. Kupreškić definitely had some interesting facets to it that we never got to.

Another aspect of my ICTY time is that there was a rules committee over there, which Judge May headed and I got appointed to, and we did make several procedural innovations to try and speed up the process. I used to carry a copy of the Federal Rules of Civil Procedure around That was one of the few documents—that and Telford Taylor's *The Anatomy of the Nuremberg Trials*—that I took over with me. It was surprising how useful both turned out to be. The other thing I didn't mention was we had to set up the beginnings of a pretrial process that was not in the charter or in the rules, but which later became a mainstay in the tribunal's and in other international courts' processes.

Q2: That's something I really would like to follow up with you next time.

Q1: Yes, that would be great.

Q2: I'll make a note of that, and maybe what we'll do if we can is review this part of the transcript and then send you some more questions.

Wald: I should tell you my schedule. I'm going away for the Christmas, up north to my daughter's, but I'm also going to Cuba for ten days in the beginning of January with a group. I won't be back here until mid-January, until the fifteenth.

Q1: Alright, great. I'll shut the recorder off and then we can pack up.

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